BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY JO COONS	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,882
RIGID FORM, INC.	)	
Respondent	)	
AND	)	
	)	
CIGNA WORKERS COMPENSATION	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's February 11, 1998, Award. The Appeals Board heard oral argument on September 2, 1998, by telephone conference.

APPEARANCES

The claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. The respondent and its insurance carrier appeared by their attorney, Michael W. Downing of Kansas City, Missouri.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award. In addition, the parties at the regular hearing stipulated to claimant's permanent functional impairment of 10 percent.

ISSUES

The Administrative Law Judge awarded claimant a 16.5 percent permanent partial general disability based on a work disability. Claimant appealed and contends she is entitled to a much higher work disability because she is currently unemployed and, therefore, she has a 100 percent wage loss.

The respondent contends the Appeals Board should either affirm the Award or reduce the Award to the stipulated permanent functional impairment of 10 percent. Respondent argues, after claimant was injured, her permanent work restrictions were accommodated by

the respondent and claimant voluntarily quit the accommodated employment. Accordingly, respondent contends claimant is limited to her 10 percent functional impairment because she was earning a comparable wage at the time she voluntarily quit the accommodated employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Findings of Fact

(1) Claimant started working for respondent on December 18, 1994, rolling fiberglass for truck camper shells manufactured by respondent.

(2) Claimant's job required her to work in a bent over position and repetitively use her right upper extremity.

(3) While performing the job of rolling fiberglass, claimant started having numbness in her right upper extremity, pain and discomfort in her back and neck areas.

(4) On May 15, 1995, the pain and discomfort reached the point that claimant sought medical treatment at the Miami County Medical Center, Inc., located in Paola, Kansas.

(5) Claimant was diagnosed with thoracic cervical strain, given pain medication, and was taken off work.

(6) Claimant was then referred to Mark R. Holscher, M.D., a local physician, who first saw claimant on May 19, 1995. Dr. Holscher diagnosed thoracic strain and myofascial pain syndrome. The doctor had claimant remain off work, prescribed physical therapy, and continued claimant on pain medication.

(7) Claimant was eventually referred by respondent's insurance carrier to physiatrist Vito J. Carabetta, M.D., located in Olathe, Kansas. Dr. Carabetta first saw claimant on August 9, 1995, diagnosed regional myofascitis affecting the right upper trapezius muscle area. The doctor placed claimant in a physical therapy program, administered trigger point injections, prescribed home exercises, and continued claimant on pain medication. Dr. Carabetta returned claimant to light duty work with no overhead arm activity and with a maximum lift of 25 pounds on October 12, 1995. The doctor released claimant on November 28, 1995, to return to work with permanent restrictions of a maximum 30-pound lift and no overhead work activities.

(8) In March 1996, claimant changed from the day shift to night shift work which precipitated a worsening in the pain and discomfort in claimant's back and right upper extremity.

(9) At that time, respondent referred claimant to physiatrist Terrence Pratt, M.D. Dr. Pratt saw claimant on July 24, 1996. He diagnosed overuse syndrome and myofascial pain syndrome. He had claimant undergo diagnostic testing of nerve conduction studies and an MRI examination of the cervical region. The MRI examination was negative and the nerve conduction studies suggested a mild entrapment of the right ulnar nerve at the wrist level. The doctor allowed claimant to continue working, placed her in an occupational therapy program, and prescribed right wrist and hand orthoses while working.

On September 18, 1996, Dr. Pratt determined that claimant's condition had met maximum medical improvement. He discharged claimant recommending a home therapy program and permanent work restrictions of maximum lift of 25 pounds, no right arm overhead activities, and right arm repetitive use activities limited to 60 minute intervals with a 2 minute rest between intervals. The doctor found claimant had sustained a 6 percent whole person functional impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). He further believed that a person with myofascial pain could have those symptoms accelerate and worsen with activity.

(10) Claimant testified she left her employment on April 14, 1997, before the shift was over because her supervisor assigned her to sweep the factory floor. She testified the repetitive sweeping activity aggravated her symptoms to the point that she could no longer continue to work. Claimant testified she told her supervisor she was leaving work and the reason she had to leave.

Claimant attempted to return to work the next day, and respondent notified her that she had voluntarily quit and the respondent refused to put her back to work.

(11) DeEnna McQuay performed the human resources function for the respondent at the time of claimant's termination and testified on behalf of respondent. Ms. McQuay testified claimant was not allowed to return to work after she left work on April 14, 1997, because she had a record of excessive lateness and absences.

Ms. McQuay further testified respondent had placed claimant on numerous jobs in an attempt to accommodate her permanent work restrictions. In fact, Ms. McQuay testified the mold setup job that claimant was performing at the time of her termination was a job within claimant's work restrictions.

(12) In contrast, claimant testified respondent had placed her on a number of jobs that were outside of her restrictions. Also, claimant testified, even if the job was within her permanent restrictions, she, at times, had pain as a result of her regular work activities. In fact, claimant testified she was unable to sweep on April 14, 1997, because of the pain and discomfort from that repetitive activity.

(13) After claimant's termination, she applied for and received unemployment benefits. During that period, claimant presented proof that she had placed applications for employment at various employers in her employment area. Also, after she was no longer

eligible for unemployment, claimant established she continued to seek employment, but at the time she last testified in this matter on October 3, 1997, she remained unemployed.

(14) At the request of claimant's attorney, P. Brent Koprivica, M.D., examined and evaluated claimant on February 12, 1997. Dr. Koprivica was supplied with claimant's previous medical treatment records to review before he examined the claimant. The doctor's conclusion was that claimant had sustained an overuse syndrome involving her right upper extremity, cervical and thoracolumbar areas. Also, he found evidence of myofascial pain in the cervical and thoracolumbar region, all a consequence of her overuse syndrome from her work.

The doctor opined that claimant had a 15 percent permanent functional impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. The doctor restricted claimant to avoid sustained or awkward neck and low back posture; avoid repetitive neck and low-back motion; avoid repetitive or sustained activities above shoulder level; and limited lifting to 25 pounds occasionally. Dr. Koprivica also advised claimant to not continue to perform activities that she subjectively could not tolerate.

(15) Claimant had only worked for two employers since she had graduated from high school. Those two employers were the respondent and a Pizza Hut restaurant. Dr. Koprivica was presented with a description of six job tasks that claimant had performed for those two employers. He opined that claimant could not perform two of those tasks because of her work-related injuries.

Conclusions of Law

(1) K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(2) However, K.S.A. 44-510e(a) limits a claimant to functional impairment so long as claimant earns a wage equal to 90 percent or more of the pre-injury average weekly wage.

(3) If claimant refuses to accept or even attempt to perform reasonably offered accommodated work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

(4) Even if accommodated work is not offered, claimant still must show she made a good faith effort to find employment. If claimant did not make a good faith effort, a wage will be imputed to claimant based on the evidence in the record as to claimant's earning ability. Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(5) The claimant should not be limited to functional impairment where the claimant attempted the offered work and is terminated when he or she advised the employer the work was causing problems. Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

(6) The Appeals Board concludes claimant is entitled to a work disability because she attempted to perform the offered accommodated employment and was terminated when she advised the employer the employment was causing her problems. Claimant testified she left her employment on April 14, 1997, because she could not continue to perform the sweeping duties assigned to her because of the pain and discomfort. Dr. Koprivica established during his testimony that claimant should not continue to perform activities she subjectively could not tolerate because of her myofascial pain syndrome.

(7) Claimant has proven she has made a good faith effort to find employment after she was terminated.

(8) Therefore, the Appeals Board concludes claimant has lost 33 percent of her task performing ability and the difference in her pre-injury wage and her post-injury wage is 100 percent because she is unemployed. The Appeals Board concludes claimant is entitled to a 66.5 percent work disability.

(9) The parties stipulated to a date of accident of December 19, 1994, and a permanent functional rating of 10 percent.

(10) Claimant is limited to the stipulated 10 percent functional impairment from the December 19, 1994, date of accident through claimant's last day worked of April 14, 1997. During that period, claimant was either temporarily totally disabled or was employed earning a comparable wage. Commencing April 15, 1997, claimant is entitled to the 66.5 percent work disability.

(11) Claimant is entitled to future medical treatment upon proper application and approval by the Director.

(12) Claimant is entitled to an unauthorized medical allowance in the statutory maximum amount of $500.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated February 11, 1998, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Kimberly Jo Coons, and against the respondent, Rigid Form, Inc., and its insurance carrier, CIGNA Workers Compensation, for an accidental injury sustained on December 19, 1994, and based upon an average weekly wage of $280.39.

Claimant is entitled to 17 weeks of temporary total disability compensation at the rate of $186.94 per week or $3,177.98, followed by 41.3 weeks of permanent partial disability compensation at the rate of $186.94 per week or $7,720.62 for a 10% permanent partial general disability through April 14, 1997, followed by 233.35 weeks of permanent partial general disability compensation at the rate of $186.94 per week or $43,622.45 for a 66.5% permanent partial general disability, making a total award of $54,521.05.

As of October 29, 1998, there is due and owing claimant 17 weeks of temporary total disability compensation at the rate of $186.94 per week or $3,177.98, followed by 41.3 weeks of permanent partial compensation at the rate of $186.94 per week in the sum of $7,720.62, followed by 80.43 weeks at the rate of $186.94 per week in the sum of $15,035.58, for a total of $25,934.18, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $28,586.87 is to be paid for 152.92 weeks at the rate of $186.94 per week, until fully paid or further order of the Director.

Claimant is entitled to the unauthorized medical expense up to the statutory maximum of $500.

All authorized medical expenses are ordered paid by respondent.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
Michael W. Downing, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director